United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

No. 1588. 381

ANTONIO MAENZA AND ALICE PALMER, APPELLANTS,

vs.

NOBLE H. THOMAS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 20, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1905.

No. 1588.

ANTONIO MALNATI AND AULICK PALMER, APPELLANTS,

vs.

NOBLE H. THOMAS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1905.

In the Court of Appeals of the District of Columbia.

ANTONIO MALNATI and AULICK PALMER, Appellants,
vs.
NOBLE H. THOMAS. } No. 1588.

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a Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
vs.
ANTONIO MALNATI and AULICK PALMER, Defendants. } At Law. No. 44610.

UNITED STATES OF AMERICA,
District of Columbia, } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration and Notice to Plead.*

Filed Apr. 8, 1901.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS
vs.
ANTONIO MALNATI and AULICK PALMER. } At Law. No. 44610.

The plaintiff sues the defendants for that heretofore, to wit, on the 24th day of October, A. D. 1900, the defendant Malnati caused a writ of *fieri facias* to be issued out of the clerk's office of the supreme court of the District of Columbia, in a cause at law numbered 40,678, and entitled Antonio Malnati, surviving partner of Lane and Malnati, against William E. Speir and Edwin F. Jones, late copartners, trading as Spier and Company, and placed the said writ in the hands of the defendant Palmer, who was then and there the United States marshal for the said District, and directed the said Palmer to levy upon certain personal property of the plaintiff, to wit, forty thousand bricks, of the value of three hundred and eighty dol-

lars, upon the pretence that the said bricks were the property of the said Jones; and for that the said defendant Palmer did, to wit, on the 24th day of November of the said year, levy upon and take into his possession and carry away the said bricks, which were then and there the property of the plaintiff and in the plaintiff's possession
in the District aforesaid, where the plaintiff was about to use
2 them in constructing a building for the Government of the United States, which the plaintiff was bound by contract, under penalty, to complete within a limited time; and caused the said bricks to be sold at public auction, and the proceeds of said sale to be applied to the payment of the judgment and costs in the aforesaid action, whereby the plaintiff was greatly delayed and hindered in performing said contract; to the damage of the plaintiff two thousand dollars; wherefore the plaintiff claims two thousand dollars, besides costs.

A. A. LIPSCOMB,
Attorney for the Plaintiff.

The defendants are to plead hereto on or before the twentieth day after service hereof, exclusive of Sundays and legal holidays, otherwise judgment.

A. A. LIPSCOMB,
Attorney for the Plaintiff.

Plea of Defendant Antonio Malnati to Plaintiff's Declaration.

Filed Apr. 17, 1901.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
vs.
ANTONIO MALNATI ET AL., Defendants. } At Law. No. 44610.

The defendant, Antonio Malnati, for plea to the plaintiff's
3 declaration says that he is not guilty as therein alleged.

DAVIS & TUCKER,
Attorneys for Defendants.

Plea of Defendant Aulick Palmer to Plaintiff's Declaration.

Filed Apr. 17 1901.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
vs.
ANTONIO MALNATI ET AL., Defendants. } At Law. No. 44610.

The defendant, Aulick Palmer, for plea to the plaintiff's declaration says that he is not guilty as therein alleged.

DAVIS & TUCKER,
Attorneys for Defendants.

Joinder in Issue.

Filed Oct. 29, 1902.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
vs.
ANTONIO MALNATI and AULICK PALMER, Defendants.
} At Law. No. 44610, Dock. No. 49.

4 The plaintiff joins issue on the plea of the defendant Antonio Malnati; and the plaintiff joins issue on the plea of the defendant Aulick Palmer.

ANDREW A. LIPSCOMB,
Attorney for Plaintiff.

Service accepted Oct. 29, 1902.
DAVIS & TUCKER,
Att'ys for Def't.

Memorandum.

May 17, 1905.—Verdict for plaintiff for $276.10.

Supreme Court of the District of Columbia.

FRIDAY, *June* 2, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

* * * * * * *

NOBLE THOMAS, Pl'ff,
v.
ANTONIO MALNATI and AULICK PALMER, Def'ts.
} At Law. No. 44610.

Upon hearing the defendant's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered: Therefore it is considered that the plaintiff recover against the defendants the sum of two hundred and seventy-
5 six dollars and ten cents ($276.10), with interest thereon from this date, being the money payable by them to the plaintiff, by reason of the premises, together with his costs of suit to be taxed by the clerk, and have execution thereof.

The defendants note an appeal to the Court of Appeals, and the penalty of the bond to operate as a supersedeas at five hundred dollars.

Memorandum.

June 12, 1905.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *June* 24, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

NOBLE H. THOMAS, Pl'ff,
v.
ANTONIO MALNATI, ET AL., Def'ts. } At Law. No. 44610.

Come here again the defendants, by their attorney, and tender to the court their bill of exceptions taken during the trial, and pray that the same be duly signed and made part of the record, now for then, which is done accordingly.

6 *Bill of Exceptions.*

Filed Jun- 24, 1905.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
v.
ANTONIO MALNATI and Another, Defendants. } Law. No. 44610.

At the trial of this cause, the plaintiff, to maintain the issues on his part joined, offered and gave evidence tending to show that the defendants caused to be levied, and levied, the writ of *fieri facias*, in the declaration mentioned, upon the certain bricks therein described to the number of thirty-one thousand, six hundred and fifty, and sold the same and applied the proceeds thereof on the judgment in the said declaration mentioned, and that the said bricks were the property of the plaintiff.

And thereupon, the plaintiff offered evidence tending to prove the value of the said bricks, to which offer the defendants, by their attorney, objected, upon the ground that there is no claim in the declaration for damages on account of the value of the said bricks, and that the mention of their value in the declaration is by way of description only, but the court overruled the said objection, to which ruling the defendants, by their attorney, then and there excepted, whereupon the plaintiff gave evidence tending to show that the value of certain of the said bricks was eight or nine dollars
7 per thousand, and the value of others thereof was ten or twelve dollars per thousand.

And thereupon, the plaintiff gave evidence tending to show that, by reason of the seizure and sale of the said bricks upon the levy aforesaid, the plaintiff's work, mentioned in the declaration, had

been hindered and delayed three or four days at a cost to the plaintiff of seventeen dollars ($17.00) per day.

And there the plaintiff rested.

And thereupon, the defendants offered and gave evidence tending to show that the officer who made the levy upon the said bricks had been led by statements of the plaintiff to believe, and relying upon such statements in fact believed that the same were the property of the certain Jones against whom the judgment, upon which said levy was made, had been rendered.

And there the defendants rested.

And thereupon, the defendants requested the court to instruct the jury as follows:

1. That if the jury should find from the evidence that the plaintiff had, by his statements and conduct before the making of the said levy, led and induced the officer making the same to believe that the bricks mentioned in the declaration were the property of the said Jones, and that the said officer, in the belief thereby induced, made the said levy the plaintiff was not entitled to recover.

2. That if the jury should find for the plaintiff, the jury should not, in its verdict, include damages for the value of the bricks
8 mentioned in the declaration, or any part thereof, for the reason that the declaration contains no claim for damages on account of the value of the said bricks. And the justice presiding granted the first of the said prayers and refused to grant the second, to which refusal and ruling the defendants, by their attorneys, then and there excepted.

And thereupon counsel for the defendant stated that he was willing to leave the case to the jury without argument or further instruction by the court; to which counsel for the plaintiff consented, and the cause was accordingly so submitted to the jury.

Each of the foregoing exceptions was taken and noted by the justice presiding in his minutes, before the jury retired to consider of its verdict, and the defendants accordingly pray the court to sign this their bill of exceptions to have the force and effect as to each as if each were set forth in a separate bill of exceptions, which prayer of the defendants is granted, and the justice presiding, accordingly, signs this bill of exceptions, to have the force and effect aforesaid, now, for then, this 21st day of June, A. D. 1905.

JOB BARNARD, *Justice.*

Settled by consent:

A. A. LIPSCOMB,
For the Plaintiff.
HENRY E. DAVIS,
For the Defendants.

9 *Designation for Transcript.*

Filed Jun- 26, 1905.

In the Supreme Court of the District of Columbia.

NOBLE H. THOMAS, Plaintiff,
vs.
ANTONIO MALNATI and Another, Defendants. } Law. No. 44610.

The defendants, appellants, hereby designate the following portions of the record in the above-entitled cause to constitute the transcript of the said record on appeal to the Court of Appeals of the District of Columbia :

(1.) The declaration.
(2.) Pleas of the defendants.
(3.) Replication.
(4.) Memorandum of judgment.
(5.) Memorandum of appeal taken and bond filed.
(6.) Bill of exceptions.

HENRY E. DAVIS,
Attorney for Defendants.

Service of copy of the foregoing designation acknowledged this 26″ day of June, A. D. 1905.

ANDREW A. LIPSCOMB,
GEO. C. MEIGS,
Attorneys for Plaintiff.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44,610 at law, wherein Noble H. Thomas is plaintiff, and Antonia Malnati and Aulick Palmer are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of July, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No 1588. Antonio Malnati and Aulick Palmer, appellants, *vs.* Noble H. Thomas. Court of Appeals, District of Columbia. Filed Jul- 20, 1905. Henry W. Hodges, clerk.